

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SUSAN K. GRUHLKE,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

Case No. 3:12-cv-05743-RBL-KLS

REPORT AND RECOMMENDATION

Noted for November 15, 2013

Plaintiff has brought this matter for judicial review of defendant's denial of her application for disability insurance benefits. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing the parties' briefs and the remaining record, the undersigned submits the following Report and Recommendation for the Court's review, recommending that for the reasons set forth below defendant's decision to deny benefits be reversed and this matter be remanded for further administrative proceedings.

FACTUAL AND PROCEDURAL HISTORY

On April 15, 2009, plaintiff filed an application for disability insurance benefits, alleging disability as of January 7, 2009, due to fibromyalgia, chronic migraine, depression, panic attacks, and interstitial cystitis. See ECF #8, Administrative Record ("AR") 18, 163. That application was denied upon initial administrative review on June 23, 2009, and on reconsideration on

1 November 24, 2009. See AR 18. A hearing was held before an administrative law judge (“ALJ”)  
2 on February 18, 2011, at which plaintiff, represented by counsel, appeared and testified, as did a  
3 medical expert and a vocational expert. See AR 34-61.

4 In a decision dated March 4, 2011, the ALJ determined plaintiff to be not disabled. See  
5 AR 18-29. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals  
6 Council on June 21, 2012, making the ALJ’s decision the final decision of the Commissioner of  
7 Social Security (the “Commissioner”). See AR 1; 20 C.F.R. § 404.981. On August 22, 2012,  
8 plaintiff filed a complaint in this Court seeking judicial review of the Commissioner’s final  
9 decision. See ECF #1. The administrative record was filed with the Court on January 7, 2013.  
10 See ECF #8. The parties have completed their briefing, and thus this matter is now ripe for the  
11 Court’s review.

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13 Plaintiff argues the Commissioner’s final decision should be reversed and remanded for  
14 further administrative proceedings because the ALJ erred: (1) in evaluating the medical evidence  
15 in the record; (2) in discounting plaintiff’s credibility; (3) in assessing her residual functional  
16 capacity; and (4) in finding her to be capable of performing other jobs existing in significant  
17 numbers in the national economy, both because that finding was based on an incomplete residual  
18 functional capacity assessment and because the issue of whether plaintiff had skills that were  
19 transferrable to those jobs was not properly evaluated by the ALJ. For the reasons set forth  
20 below, the undersigned agrees the ALJ erred in finding plaintiff to be capable of performing  
21 other jobs existing in significant numbers in the national economy by failing to properly evaluate  
22 the issue of plaintiff’s transferrable skills, and thus in determining plaintiff to be not disabled.  
23 Thus, on this basis the undersigned recommends that defendant’s decision to deny benefits be  
24 reversed, and that this matter be remanded for further administrative proceedings.  
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## DISCUSSION

The determination of the Commissioner that a claimant is not disabled must be upheld by the Court, if the “proper legal standards” have been applied by the Commissioner, and the “substantial evidence in the record as a whole supports” that determination. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); see also Batson v. Commissioner of Social Security Admin., 359 F.3d 1190, 1193 (9th Cir. 2004); Carr v. Sullivan, 772 F.Supp. 522, 525 (E.D. Wash. 1991) (“A decision supported by substantial evidence will, nevertheless, be set aside if the proper legal standards were not applied in weighing the evidence and making the decision.”) (citing Browner v. Secretary of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1987)).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation omitted); see also Batson, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if supported by inferences reasonably drawn from the record.”). “The substantial evidence test requires that the reviewing court determine” whether the Commissioner’s decision is “supported by more than a scintilla of evidence, although less than a preponderance of the evidence is required.” Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence admits of more than one rational interpretation,” the Commissioner’s decision must be upheld. Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence sufficient to support either outcome, we must affirm the decision actually made.”) (quoting Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)).<sup>1</sup>

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<sup>1</sup> As the Ninth Circuit has further explained:

. . . It is immaterial that the evidence in a case would permit a different conclusion than that which the [Commissioner] reached. If the [Commissioner]’s findings are supported by substantial evidence, the courts are required to accept them. It is the function of the [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may not try the case de novo, neither may it abdicate its traditional function of review. It must

1 If a claimant cannot perform his or her past relevant work, at step five of the disability  
 2 evaluation process the ALJ must show there are a significant number of jobs in the national  
 3 economy the claimant is able to do. See Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir.  
 4 1999); 20 C.F.R. § 404.1520(d), (e). The ALJ can do this through the testimony of a vocational  
 5 expert or by reference to defendant's Medical-Vocational Guidelines (the "Grids"). Tackett, 180  
 6 F.3d at 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000).

8 An ALJ's findings will be upheld if the weight of the medical evidence supports the  
 9 hypothetical posed by the ALJ. See Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987);  
 10 Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's testimony  
 11 therefore must be reliable in light of the medical evidence to qualify as substantial evidence. See  
 12 Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's description of the  
 13 claimant's disability "must be accurate, detailed, and supported by the medical record." Id.  
 14 (citations omitted). The ALJ, however, may omit from that description those limitations he or  
 15 she finds do not exist. See Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

17 In this case the ALJ found in relevant part as follows:

18 The vocational expert [{"VE"}] testified that the claimant's past relevant work  
 19 as a **Pharmacy Assistant**, which was semi-skilled with a specific vocational  
 20 preparation (SVP) code of 3 and required the following skills: use of an  
 adding machine.

21 . . .

22 The vocational expert was asked if any occupations exist which could be  
 23 performed by an individual with the same age, education, past relevant work  
 24 experience, and residual functional capacity as the claimant, and which  
 require skills acquired in the claimant's past relevant work but no additional  
 25 skills. The vocational expert responded and testified that representative

26 scrutinize the record as a whole to determine whether the [Commissioner]'s conclusions are  
 rational. If they are . . . they must be upheld.

Sorenson, 514 F.2dat 1119 n.10.

REPORT AND RECOMMENDATION - 4

occupations such an individual could perform include:

**Medical Voucher Clerk**<sup>[2]</sup>: [D.O.T. 214.482-018, sedentary, SVP 3, semiskilled]

**Doctor's Receptionist**<sup>[3]</sup>: [D.O.T. 237.367-038, sedentary, SVP 4, semiskilled]

Pursuant to SSR 00-4p, the vocational expert's testimony is consistent with the information contained in the Dictionary of Occupational Titles.

Accordingly, although the claimant's additional limitations do not allow the claimant to perform the full range of light work, considering the claimant's age, education and transferrable work skills, a finding of "not disabled" is appropriate under the framework of Medical-Vocational Rule 202.15 and Rule 202.07.

AR 27-28 (emphasis in original).

In asserting error here, plaintiff states that "neither the vocational expert nor the ALJ identified any transferable skills that [she] had from her past relevant work that would transfer to the jobs of medical voucher clerk and doctor's receptionist." ECF #12, p. 18. Defendant is correct that, as noted above, the ALJ did find plaintiff had transferrable skills consisting of the use of an adding machine. See AR 27. But as argued by plaintiff, the current record does not fully support a finding that she acquired the ability to use an adding machine that necessarily constitutes a skill that can be transferred to the above two jobs. The transcript from the hearing contains the following exchange between the ALJ and the vocational expert:

[ALJ] . . . Are the skills from [plaintiff's pharmacy assistant] job transferrable to any jobs within the reach of my hypothetical [question<sup>4</sup>]?]

<sup>2</sup> In a footnote the ALJ stated: "The vocational expert testified this occupation requires the use of an adding machine, which is a transferrable skill from [plaintiff's] previous job as a Pharmacy Assistant." AR 28 n.3.

<sup>3</sup> In another footnote the ALJ further stated: "The vocational expert testified that based on the claimant's behavior in the courtroom and demonstrated ability to answer questions combined with her transferrable skills indicates she has the necessary skills to perform this occupation." AR 28 n.4.

<sup>4</sup> That hypothetical question reads in relevant part:

. . . Now assume a lady in an age from 50 to . . . 55 with a GED education, and the past relevant work in the last 15 years that the claimant . . . has had. Assume this lady can walk at one time about two blocks. That she can stand at one time for 30 minutes. She can sit for an

1 [VE] Yes, Your Honor.

2 [ALJ] Could you be specific?

3 [VE] Yes, Your Honor. In terms of transferrable skills, I'm sorry, just  
4 a moment please. There is a medical voucher clerk in the insurance industry  
5 that is a sedentary occupation with a skill level of three, semiskilled. . . . That  
6 does require the use of an adding machine.

7 [ALJ] Uh-huh.

8 [VE] So there are transferrable skills there, *if she could do adding  
9 machine frequently, which it sounds like that would be questionable.*

10 [ALJ] Uh-huh.

11 [VE] There is a doctor's receptionist, which is . . . a sedentary  
12 occupation at a skill level of four. That someone with those limitations could  
13 do.

14 AR 57-58 (emphasis added). Accordingly, contrary to the ALJ's findings, the vocational expert  
15 did not testify that plaintiff had the transferrable skills needed to perform the jobs identified, but  
16 rather indicated that the transferability thereof was in question given the need to be able to make  
17 frequent use of the adding machine. It is not at all clear, therefore, that plaintiff has the ability to  
18 perform either of the two identified jobs based on the testimony of the vocational expert, making  
19 the ALJ's reliance thereon to so find improper.

20 The Court may remand this case "either for additional evidence and findings or to award  
21 benefits." Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ's decision, "the  
22 proper course, except in rare circumstances, is to remand to the agency for additional  
23 investigation or explanation." Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (citations  
24 omitted). Thus, it is "the unusual case in which it is clear from the record that the claimant is

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25 hour. She can lift occasionally not more than 20 pounds, and not repetitively but with some  
26 frequency, not more than ten pounds. She is right-handed. She has had carpal tunnel surgery  
on both hands in the past. She has some pain and continued use of the hands. Other than that,  
use of the hands is normal. Pushing and pulling would be limited to where the -- horizontal --  
component wouldn't be more than 20 pounds, and that not more than five minutes at any one  
time. She could climb half-a-dozen stair steps using a hand rail. Eyesight is functional.  
Hearing is functional. She has a moderate impairment in short-term memory and in the  
ability to maintain concentration. She has depression, which imports a certain amount of  
fatigue. Let's assume she has the energy of no more than 90 percent of a lady her age in good  
health . . .

AR 56-57.

REPORT AND RECOMMENDATION - 6

1 unable to perform gainful employment in the national economy,” that “remand for an immediate  
2 award of benefits is appropriate.” Id.

3 Benefits may be awarded where “the record has been fully developed” and “further  
4 administrative proceedings would serve no useful purpose.” Smolen, 80 F.3d at 1292; Holohan  
5 v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded  
6 where:

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8 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the  
9 claimant’s] evidence, (2) there are no outstanding issues that must be resolved  
10 before a determination of disability can be made, and (3) it is clear from the  
record that the ALJ would be required to find the claimant disabled were such  
evidence credited.

11 Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002).  
12 Because issues still remain with respect to the transferability of plaintiff’s skills, and therefore  
13 her ability to perform other jobs existing in significant numbers in the national economy, remand  
14 for further consideration of those issues is warranted.

#### 15 CONCLUSION

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17 Based on the foregoing discussion, the undersigned recommends the Court find the ALJ  
18 improperly concluded plaintiff was not disabled. Accordingly, the undersigned recommends as  
19 well that the Court reverse defendant’s decision to deny benefits and remand this matter for  
20 further administrative proceedings in accordance with the findings contained herein.

21 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure (“Fed. R. Civ. P.”)  
22 72(b), the parties shall have **fourteen (14) days** from service of this Report and  
23 Recommendation to file written objections thereto. See also Fed. R. Civ. P. 6. Failure to file  
24 objections will result in a waiver of those objections for purposes of appeal. See Thomas v. Arn,  
25 474 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk  
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1 is directed set this matter for consideration on **November 15, 2013**, as noted in the caption.

2 DATED this 30th day of October, 2013.

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6 Karen L. Strombom  
7 United States Magistrate Judge  
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